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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ~~484~~ 143.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES, APPELLEE.

MOTION TO DISMISS AND BRIEF FOR THE APPELLEE.

JOHN C. FAY,
Attorney for Appellee.

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THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES, APPELLEE.

MOTION TO DISMISS.

Now comes the appellee, by John C. Fay, his attorney, and moves the court to dismiss the appeal in this cause for want of jurisdiction to entertain the same.

JOHN C. FAY,
Attorney for Appellee.

BRIEF FOR THE APPELLEE.

This is a motion to dismiss a second appeal of the District of Columbia upon the ground that no appeal lies in this case; hence this court is without jurisdiction to entertain it.

STATEMENT OF THE CASE.

This was a suit brought in the Court of Claims by the appellee against the District of Columbia under the act of June 16, 1880 (21 Stat., 284), conferring on that court jurisdiction to hear and determine suits against the District of Columbia to recover for work and labor performed (or material provided) by him in the improvement of the streets of the city under contracts with the District.

The suit was brought August 4, 1880, and has been in almost continuous litigation in that court from that time until March 31, 1902, when a final judgment was rendered.

The jurisdictional act of June 16, 1880 (21 Stat., 284), provided in section 3 for appeals to this court if taken within ninety days after the rendition of the judgment, and section 6 provided a method for the payment of judgments so rendered, viz:

"SECT. 6. The Secretary of the Treasury is hereby authorized to demand of the sinking fund commissioner of the District of Columbia so many of the three sixty-five bonds authorized by act of Congress approved June twentieth, eighteen hundred and seventy-four, and acts amendatory thereof as may be necessary for the payment of the judgments; and said sinking fund commissioner is hereby directed to issue and deliver to the Secretary of the Treasury the amount of three sixty-five bonds required to satisfy the judgments; which bonds shall be received by said claimants at par in payment of such judgments, and shall bear date August first, eighteen hundred and seventy-four, and mature at the same time as other bonds of this issue: *Provided*, That

before the delivery of such bonds as are issued in payment of judgments rendered as aforesaid on the claims aforesaid, the coupons shall be detached therefrom from the date of said bonds to the day upon which such claims were due and payable; and the gross amount of such bonds heretofore and hereafter issued shall not exceed in the aggregate fifteen millions of dollars: *Provided*, The bonds issued by the authority of this act shall be of no more binding force as to their payment on the Government of the United States than the three sixty-five bonds issued under the authority of the act of June twentieth, eighteen hundred and seventy-four" (21 Stat., 286).

A subsequent statute, act of March 3, 1881 (Supp. Rev. Stat., vol. 1, p. 605), gave to the Treasurer of the United States, who was *ex officio* under act of June 11, 1878 (sec. 7, Supp. Rev. Stat., vol. 1, p. 179), commissioner of the sinking fund of the District of Columbia, the *option* of delivering the bonds in satisfaction of these judgments, or of selling the bonds and paying the judgments in cash. This gave the District the benefit of the premium on the bonds whenever they were at a premium, and the creditor the loss on the bonds whenever they were at a discount.

This continued to be the law until 1900, when it was changed by the following amendment inserted in the general deficiency appropriation bill of that year, act approved June 6, 1900, viz:

* * * * * * *

"Defending suits in claims.—For defending suits in the United States Court of Claims, two thousand dollars: *Provided*, That *no judgment heretofore* or *hereafter rendered under the act of June sixteenth, eighteen hundred and eighty*, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' *shall be paid by the Secretary of the Treasury until said judgment shall have been* REPORTED TO, *and specific authority for payment thereof granted by, Congress.*"

* * * * * * *

approved June 6, 1900 (Statutes at Large, vol. 31, chap. 789, p. 572).

After the passage of this amendment this case was finally heard, and judgment was rendered in favor of appellee in the Court of Claims March 31, 1902, for $23,694.47. From that judgment, and within ninety days thereafter, on April 22, 1902, an appeal was taken to this court by the present appellant, and such appeal was docketed July 29, 1902, as No. 400, on its October term calendar of 1902.

On October 23, 1902, appellee moved to dismiss the appeal for want of jurisdiction, and on December 8, 1902, this court granted the motion and dismissed the appeal for want of jurisdiction, and its mandate went down to the Court of Claims January 8, 1903.

Barnes *vs.* D. C., 187 U. S., 638.

March 3, 1903, an amendment was inserted in the general deficiency appropriation bill of that year in the following terms, viz:

JUDGMENTS, COURT OF CLAIMS.

"For the payment of the judgments * * * *And provided further*, That the proviso contained in the act approved the sixth day of June, anno Domini nineteen hundred, entitled 'An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes,' which reads as follows: *Provided*, That no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by, Congress, be, and the same is hereby, repealed; and from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any

time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

Act approved March 3, 1903, chap. 1006, Pub. Laws, 2d sess., 57th Cong., p. 1070.

On the 20th day of May, 1903, FOURTEEN MONTHS after the rendition of the judgment, the District of Columbia undertook to take a *second appeal* from this judgment of March 31, 1902, claiming a right so to do under the provisions of the amendment to the general deficiency bill of March 3, 1903, and that appeal having been transmitted here, the appellee now moves to dismiss it for want of jurisdiction.

ARGUMENT.

The appellee contends, from this statement of the record, that the judgment of the Court of Claims was a final judgment on the 31st day of March, 1902, and his rights thereby became finally vested, the District of Columbia's right to an appeal having been adjudged to be without foundation, and that the paragraph in the act of March 3, 1903, in so far as it is claimed confers upon the District of Columbia the right of appeal, is absolutely null and void for the reasons:

First. That it is the exercise of a judicial and not a legislative power, and that no judicial power is by the Constitution vested in the Congress of the United States.

Second. That its application to the case of Barnes *vs.* The District of Columbia would be to give it the effect of a retrospective law destroying vested rights, not permissible and not within the power of Congress.

The status of the District of Columbia as a municipal corporation is defined both in its charter under the act of February 20, 1871, establishing the Board of Public Works, etc.

(sec. 2, Rev. Stat. D. C., p. 1), and the act of June 11, 1878 (vol. 20, p. 102). The very apt words in the act establishing the present form of government are in its first section:

"The District of Columbia shall remain and continue a municipal corporation, as provided in section two of the Revised Statutes relating to said District, and the Commissioners herein provided for shall be deemed and taken as officers of such corporation; and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect."

Section 2, Revised Statutes of the District of Columbia, provides:

"The District is created a government by name of the District of Columbia, by which name it is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this title."

That section was construed by the Supreme Court of the United States in the case of Barnes *vs.* The District of Columbia, 91 U. S., 543, to hold the District of Columbia liable as a municipal corporation for the negligence of its officers; not only those they had the power to appoint themselves, but even such officers as were appointed by the United States without their consent or concurrence.

It fixed indisputably the status of the District of Columbia as a municipal corporation, liable for its obligations, as well as liable for the negligence of its officers.

In the case of Metropolitan Railroad Company *vs.* District of Columbia, 132 U. S., p. 1, this court, construing sec. 2, Revised Statutes of the District of Columbia in connection with the act of 1878, *supra*, and reviewing all legislation, held the District of Columbia to be a municipal corporation,

subject to the ordinary rules that govern the law of procedure between private persons.

It was distinctly claimed in that case that the District of Columbia was a separate State or sovereignty; but this claim was emphatically denied.

Mr. Justice Bradley, speaking for this court, on page 3 of the opinion, says:

"The first question, therefore, will be, whether the District of Columbia is, or is not, a municipal body merely, or whether it has such a sovereign character, or is so identified with or representative of the sovereignty of the United States as to be entitled to the prerogatives and exemptions of sovereignty."

And again, after reviewing all the legislation with reference to the government of the District from its first organization (pp. 3–7), the court adds (p. 7):

"In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States Government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the Government itself. WE CANNOT ASSENT TO THIS VIEW. It is contrary to the express language of the statutes. That language is that the District shall 'remain and continue a municipal corporation,' with all rights of action and suits for and against it."

And on page 9:

"We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and SUBJECT TO THE ORDINARY RULES THAT GOVERN THE LAW OF PROCEDURE BETWEEN PRIVATE PARTIES."

The pretensions of the appellant that this is substantially a suit against the United States, and hence against the sovereign, and the right to sue is a mere matter of grace, which may be withdrawn, modified, or changed at the pleasure of the sovereign, has no foundation upon which to rest and is most effectually disposed of in the foregoing case. It is true

that the defense of the District under the act of June 16, 1880, is placed in the charge of the Attorney General, and that a kind of spiritual liability is assumed by the United States to see that the District meets her obligations growing out of her issue of 3.65 bonds, a liability no stronger than its obligation to *appropriate* for the payment of judgments rendered in the supreme court of the District of Columbia under the act of 1878. But that does not make the United States a defendant in law or in fact, nor does the imposing of duties relating to the District upon the Attorney General produce such an effect. In point of fact, the Attorney General has not heretofore conducted, nor does he now conduct, any such defense, but confides it to a special assistant attorney, who is paid out of the revenues of the District of Columbia. (See acts.)

The imposing of duties relative to the District upon United States officers and the contribution by the United States of appropriations for the improvement, repair of streets, sewers, etc., and other purely municipal objects has been in vogue for a century, and the Secretary of the Interior, the Secretary of the Treasury, the Treasurer, the Comptrollers, and many other officers have from time to time performed, and some still perform, duties purely municipal in their character, as pointed out by this court in the Metropolitan Railroad case and the Barnes case, cited *supra;* but neither the one nor the other or all three combined operate to change the status of the District of Columbia or raise it from its character of a purely municipal corporation.

So in entering this discussion we eliminate any question of sovereignty. This is a litigation between private parties pure and simple. Both stand upon equal ground, neither enjoying any special exemptions or privileges.

While it may be conceded that the United States may impose, and vary them at its pleasure, any conditions giving the right of suit against the sovereign or withdrawing the right altogether, it is most strenuously contended that the

legislature cannot intervene to grant special privileges or additional privileges to one litigant and to destroy or impair the vested rights of his antagonist.

It is immaterial whether at the date of the rendition of the Barnes judgment the District of Columbia had the right of appeal or not. The right of appeal is not a vested right and can be withdrawn by the legislature even after it has accrued, and that has been frequently done, and legislation of that kind has been affirmed by the Supreme Court (R. R. *vs.* Grant, 98 U. S., 398).

The converse of the proposition is quite another question. When one has a judgment that is final, he has a vested right in property and that cannot be taken away from him by the legislature. Congress has no more power, by the grant to it of exclusive legislation, over the District of Columbia, than a State has over its territory.

The clause in the Constitution by virtue of which Congress governs the District of Columbia is in the following language:

"SEC. 8. To exercise exclusive legislation in all cases whatsoever over such District not exceeding ten miles square, as may be by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States."

It does not confer upon Congress the right to exercise any judicial power over the District of Columbia. All judicial power, by article 3 of the Constitution, is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

It can hardly be contended that the allowance of an appeal in favor of one party to a litigation is not the exercise of judicial power. To permit Congress to grant appeals or new trials with respect to private individuals would be to carry back to the dark ages the principles upon which the civilization of today rests. No blacker page in the history of the

law can be found than that of the time when the legislature controlled the independence of the judiciary, and those provisions in some of the colonial charters which granted to the legislature the right to grant new trials to litigants were wiped out by the Constitution of the United States and every one of the States. Since that time there can be found no case, except in a suit to which the State or the United States was party, where a new trial or an appeal has been allowed.

Of course, where the State was successful, she might consent that her citizen should have a new trial, and there have been, possibly half a dozen, cases where citizens unjustly convicted have been awarded a new trial by the legislature on account of such unjust conviction, or where the United States has authorized a *new trial as against herself* where she has obtained an inequitable judgment, but these are all founded on the doctrine of the consent of the successful litigant. I can find no case where as between private parties special legislation interfering with the rights of the successful litigant and disturbing his judgment has been sustained.

This doctrine is fully sustained by numerous authorities. See—

Lewis *et al. vs.* Webb, 3 Me., 326. Opinion by Chief Justice Mellin.

Durham *vs.* Lewiston, 4 Me., 140.

Merrill *vs.* Sherburne, 1 N. H., 199. Opinion by J. Woodbury.

Bates *vs.* Kimball, 2d chap. (Me.), 77. Opinion by J. Aikins.

Sydnor *vs.* Palmer, 32 Wis., 409. A very learned opinion by Dixon, C. J.

Town of Lancaster *vs.* Barr, 25 Wis., 560.

Davis *vs.* Menasha, 21 Wis., 491.

Stanford *vs.* Barry, 1 Aikins, 314.

The appellee submits that this motion should be granted and this protracted litigation, extending now over a period of twenty-five years, be ended, and the appellee during his lifetime should be paid for the labor and material which he expended in beautifying the streets of this city more than a *third of a century* ago.

Respectfully submitted.

JOHN C. FAY,
Attorney for Appellee.